

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D. C. 20548

FILE: B-221087.2**DATE:** April 7, 1986**MATTER OF:** The W.H. Smith Hardware Company--Request
for Reconsideration**DIGEST:**

Prior decision which held that bid on a total small business set-aside solicitation which fails to indicate that bidder intends to furnish supplies manufactured by a small business is non-responsive is affirmed on reconsideration where the bidder has misinterpreted a Small Business Administration Office of Hearings and Appeals decision which the bidder cited as contrary to our ruling.

The W.H. Smith Hardware Company (W.H. Smith) requests reconsideration of our decision in The W.H. Smith Hardware Company, B-221087, Dec. 4, 1985, 85-2 C.P.D. ¶ 627, in which we dismissed W.H. Smith's protest against the rejection of its bid as nonresponsive to invitation for bids (IFB) No. DAAE07-85-B-K063, a total small business set-aside, issued by the United States Tank-Automotive Command.

We affirm our prior decision.

W.H. Smith certified itself as a small business concern and as a manufacturer of the supplies being offered under the Walsh-Healey Act representation; however, it did not certify that all supplies furnished would be manufactured or produced by a small business. W.H. Smith initially contended that since it stated in its bid that its plant would be where the manufacturing, assembling, and shipping would take place, its failure to complete the certification should have been waived as a minor irregularity because the bid as a whole showed that all supplies would be manufactured by a small business.

We found that the certification could not be waived because it concerned a matter of responsiveness, which must be determined at bid opening. Further, we found that the bidder's failure to assume the obligation to furnish supplies manufactured or produced by a small business was not obviated by completion of the IFB's place of performance

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and shipping point because it only expresses a present intent to provide the principal production facility. The listing of the production facility is informational in nature and, thus, related to responsibility rather than responsiveness. Therefore, a bidder is not precluded from altering its designated place of performance after bid opening. Finally, a small business bidder that represents itself as a manufacturer for Walsh-Healey purposes is not prohibited from subcontracting and has not, in fact, legally obligated itself to manufacture the offered supplies. Rather, the firm could subcontract the entire work to a large business manufacturer if its business interests so dictated. Therefore, we held that W.H. Smith's representation of itself as a small business and designation that it intended to manufacture supplies at its plant was insufficient to show a binding legal obligation to furnish supplies manufactured or produced by a small business.

In its request for reconsideration, W.H. Smith contends that our decision is inconsistent with the Small Business Administration (SBA) Office of Hearings and Appeals decision dated October 9, 1985, in the Size Appeal of W.H. Smith Hardware Company, Docket SIZ-84-7-31-142, which it alleges ruled that the responsiveness of a small business manufacturer does not depend upon whether it furnishes raw materials, parts or supplies from a small or large business. On the basis of the SBA decision, W.H. Smith contends that its bid is responsive because a small business manufacturer is allowed to purchase its raw materials, parts or supplies to be used to manufacture the final product from a small or large business. Therefore, W.H. Smith argues that the failure to complete the certification should be waived in accordance with Extinguisher Service, Inc., B-214354, June 14, 1984, 84-1 C.P.D. ¶ 629, because it did not affect the responsiveness of its bid. W.H. Smith argues that our decision is correct when limited to small business regular dealers, but incorrect when applied to small business manufacturers.

W.H. Smith further contends that the format used in the small business certification clause is confusing because the check boxes for certifying that all supplies will be furnished by a small business are indented directly under the "is not a small business concern" line. Since W.H. Smith had already checked that it is a small business, it argues that it seemed redundant to complete the certification. Finally, W.H. Smith takes issue with our conclusion that it is not legally obligated to furnish supplies from the place of manufacture because the IFB required contracting officer approval prior to any change in the place of manufacture.

W.H. Smith has misapplied the SBA's decision, which dealt with the status of a bidder as a small business as it relates to the business' manufacturing activities. The decision holds that manufacturers can furnish products manufactured from parts obtained from a small or large business and still retain small business manufacturing status, as opposed to small business nonmanufacturers, which must furnish products manufactured by small businesses. It is apparent that W.H. Smith has interpreted supplies erroneously in the SBA's decision and in the certification. The proper use of the word supplies in the certification clause is that supplies means the end product. See Mountaineer Leathers, Inc., B-218453, May 6, 1985, 85-1 C.P.D. ¶ 505. Thus, while the term supplies may be used to indicate materials that go into the manufacturing process when determining the small business status of a bidder, it only means end product when referred to in the certification clause. In other words, the bidder must certify that the end product (meaning the actual item be procured by the government) will be manufactured or produced by a small business.

In the initial decision, the status of W.H. Smith as a small business manufacturer was not at issue; the question was whether W.H. Smith intended to furnish all supplies manufactured or produced by a small business. Therefore, Extinguisher Service, Inc., B-214354, supra, cited by the protester, is also inapplicable because that case dealt with the failure to complete the certification of a bidder's small business size status.

In connection with W.H. Smith's belief that the language is confusing, we have recognized that it may be, but that the clause is standard and the proper interpretation is well established. Therefore, we will not consider a postopening explanation for not completing the certification. See Scott Forge, B-219625, Aug. 2, 1985, 85-2 C.P.D. ¶ 126.

We have held that a bid which did not contain the certification that all supplies would be manufactured or produced by a small business was improperly rejected where the IFB advised that the failure to list the place of performance could be cause to reject the bid and further stated that the performance of work at other than the listed location was prohibited unless approved in writing in advance by the contracting officer. The reason for this holding is that absent the contracting officer's approval, the contractor is obligated to the listed place of performance. See ASC Industries, B-216293, Dec. 21, 1984,

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84-2 C.P.D. ¶ 684. However, contrary to W.H. Smith's statements, the IFB in this case does not contain this restriction.

Finally, we find that W.H. Smith's challenge to the responsiveness of the awardee's bid is untimely because the issue was not raised until well beyond 10 working days after the basis for the protest should have been known. 4 C.F.R. § 21.2(a)(2) (1985).

Our prior decision is affirmed.

Harry R. Van Cleve

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